EX PARTE OR LATE FILED

National Cable Television Association

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February 10, 1997

Ex Parte

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Telecommunications Services - Cable Home Wiring
Customer Premise Equipment, CS Docket No. 95-184

Dear Mr. Caton:

On February 7, 1997, Dan Brenner, Paul Glist, Art Harding, Peter Feinberg, and Michael Schooler met with Bill Kennard; Sonya Rifkin and Mary Beth Murphy to discuss jurisdictional compensation and implementation issues in the above captioned docket. A copy of handouts summarizing the presentation is attached.

Sincerely,

Daniel L. Brenner

DLB:tkb

Enclosure

cc: John Logan

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Ex Parte: CS Docket 95-184/MM Docket 92-260

Cable Home Wiring in MDUs

February 7, 1997

The Commission Does Not Have the Legal Authority to Effectively Divest Cable of Common Wiring in MDUs.

- Section 624 applies only "within the premises of such subscriber."

> Within 120 days after the date of enactment of this subsection, the Commission shall prescribe rules concerning the disposition, after a subscriber to a cable system terminates service, of any cable installed by the cable operator within the premises of such subscriber.

Congress specifically provided that "this section limits the right to acquire home wiring to the cable installed within the interior premises of a subscriber's dwelling unit." H. Rep. 102-628 at 118.

Conference Report, H. Rep. 102-862 at 86.

> The conference agreement adopts the House provisions.

House Report, H. Rep. 102-628 at 118-19.

> This section limits the right to acquire home wiring to the cable installed within the interior premises of a subscriber's dwelling unit. *** This section deals with internal wiring within a subscriber's home or individual dwelling unit. In the case of multiple dwelling units, this section is not intended to cover common wiring within the building, but only the wiring within the dwelling unit of individual subscribers.

- Section 623 is not a basis. All rate concerns have been adddressed by reducing installation charges to cost. If anything, the 1996 Act indicates that any rate concerns in MDU's is a concern over rates being too low (see restriction in 623(d) on predatory pricing). Section 623 in any event protects the "subscriber" which is defined to exclude building owners and others who redistribute signals. 47 CFR §76.5(ee). Finally, Section 623 cannot be used to evade the limits set by Congress' express provision on inside wiring. See, e.g. *Time Warner v. FCC*, 56 F.3d 151 (D.C.Cir. 1995)(the Commission may not evaluate disposition of franchise fees under its broad mandate over basic service rates; "even if the Commission could consider relevant criteria in determining whether a

franchising authority can afford to regulate, it could not use those criteria to accomplish indirectly what § 542(i) directly proscribes.")

- Section 652(d) of the 1996 Act also addresses the issue:

> a local exchange carrier may obtain, with the concurrence of the cable operator on the rates, terms, and conditions, the use of that part of the transmission facilities of a cable system extending from the last multi-user terminal to the premises of the end user, if such use is reasonably limited in scope and duration, as determined by the Commission.

Congress has limited any claims by LECs who wish to use cable network wiring from the last multiuser terminal to the end user premises—which includes cable drops and MDU wiring. Section 652(d)(2) forbids such use without the concurrence of the cable operator. Even then the Act permits such use only on a temporary, limited basis.

The Conference Report 104-458 at 173-75 states that all that is contemplated is the use of "excess capacity""with the concurrence of the cable operator" if "reasonably limited in scope and duration." The comparable House version was described as permitting the use of the "drop" from the curb to the home by contract with the cable operator if limited in scope and duration. House Report, H. Rep. 104-204 at 103; Conf. Rep. 104-458 at 173.

This cannot be read to support the non-consensual, permanent transfer of exclusive ownership of the entire distribution facility envisioned in LEC proposals to the FCC.

Note: GTE is incorrect in its claim that 652(d) merely codifies the FCC's Video Dial Tone rules. First, there is nothing in the 1996 Act or legislative history supporting GTE's view of this intention. Second, within its own terms, the VDT Order does not support the mandatory transfer of ownership of common wiring. The VDT Order, 10 FCC Rcd 244 at ¶53-55 (1994) states: "We do not prohibit such leasing arrangements, provided they are executed for non-renewable terms no longer than three years. ...We also prohibit LECs from acquiring exclusive rights to use cable drops. ... We will scrutinize these terms to ensure that they are reasonable and, in particular, do not undermine our goal of promoting competitive wire-based video systems."

- Section 1 is insufficient basis for preempting State law contract and property rights.

NARUC v FCC, 533 F.2d 601 (D.C. Cir. 1975) held that FCC could not use Section 1 to preempt state law regulation of two-way point-to-point non-video services offered over cable.

> The language of 1§2(a) is quite general and is not unambiguously jurisdictional in character. There is nothing in the words themselves compelling a conclusion that any or all operations of a cable system are within the ambit of Commission power. ...
>
> We are not convinced that this goal of a nationwide communications network must, in all cases, take precedence, especially where the Commission jurisdiction is explicitly denied under other priovisions of the Act. ...
>
> [T]he allowance of a "wide latitude" in the exercise of delegated powers is not the equivalent of untrammelled freedom to regulate activiities over which the statute fails to confer, or explicitly denies, Commission authority.

NARUC III, NARUC v FCC, 880 F.2d 422 (D.C. Cir. 1989) held that FCC lacked the authority to preempt state regulation of telephone inside wiring under Section 2(b) and *Lousiana PSC*, because preemption of statelaw was far beyond the degree needed to create a competitive inside wiring market.

Bell Atlantic v FCC, 24 F.3d 1441 (D.C. Cir. 1994) held that the Commission's authority to order carriers "to establish physical connections with other carriers....", if ambiguous under Section 201, must be construed to exclude physical collocation which implicates the Takings Clause.

> Ordinarily *Chevron* ... would supply the standard for assessment of the claimed authority, but not so here. Within the bounds of fair interpretation, statutes will be construed to defeat administrative orders that raise substantial constitutional questions. Rust v. Sullivan, 500 U.S. 173, 111 S. Ct. 1759, 1771, 114 L. Ed. 2d 233 (1991); Edward J. DeBartolo Corp. v. Florida Gulf Coast Trades Council, 485 U.S. 568, 575-78, 99 L. Ed. 2d 645, 108 S. Ct. 1392 (1988). The Commission's decision to grant CAPs the right to exclusive use of a portion of the petitioners' central offices directly implicates the Just Compensation Clause of the Fifth Amendment, under which a "permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426, 73 L. Ed. 2d 868, 102 S. Ct. 3164 (1982). ... Chevron deference to agency action that creates a broad class of takings claims, compensable in the Court of Claims, would allow agencies to use statutory silence or ambiguity to expose the Treasury to liability both massive and unforeseen. ... The Commission's power to order "physical connections," undoubtedly of broad scope, does not supply a clear warrant to grant third parties a license to exclusive physical occupation of a

> section of the LECs' central offices. ... The Commission's decision to mandate physical co-location, therefore, simply amounts to an allocation of property rights quite unrelated to the issue of "physical connection."

California v. FCC, 905 F.2d 1217 (9th Cir. 1990) held that Section 1 does not permit preemption of state regulation of enhanced services.

> Title I is not an independent source of regulatory authority; rather, it confers on the FCC only such power as is ancillary to the Commission's specific statutory responsibilities. [n.35].
>
> As the Supreme Court made clear in *Lousiana PSC*, the FCC must do more that pay lip service to Congress' intent "to enact a *dual* regulatory system." [1244]

NUMEROUS PRACTICAL ISSUES NEED TO BE ADDRESSED IF THE POINT OF DEMARCATION IS TO BE MOVED.

A. Procedures need to be established to guard against signal leakage.

B. Procedures need to be established to trace the source of signal leakage if multiple providers serve the same MDU.

C. Procedures need to be established to prevent one provider from denigrating the integrity of the other provider's network, for example, to prevent provision of internet access or telephony.

D. Procedures need to be established to guard against theft of service.

E. The only reasonable proposal to address the signal leakage and theft issues surrounding any change in the MDU broadband demarcation point is to require the installation of a neutral demarcation box, so that no MVPD or other unauthorized party will have any justification for tampering with the distribution facilities of another MVPD in the MDU. Procedures need to be established for the installation, management and recovery of costs associated with the neutral demarcation box.

F. The Commission needs to address how the change in the demarcation point will affect the incentives of cable operators to upgrade their facilities in MDUs, particularly in light of overall policy of the 1996 Telecommunications Act to "accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services," as well as the Commission's specific obligations under Sec. 706 of the 1996 Act.

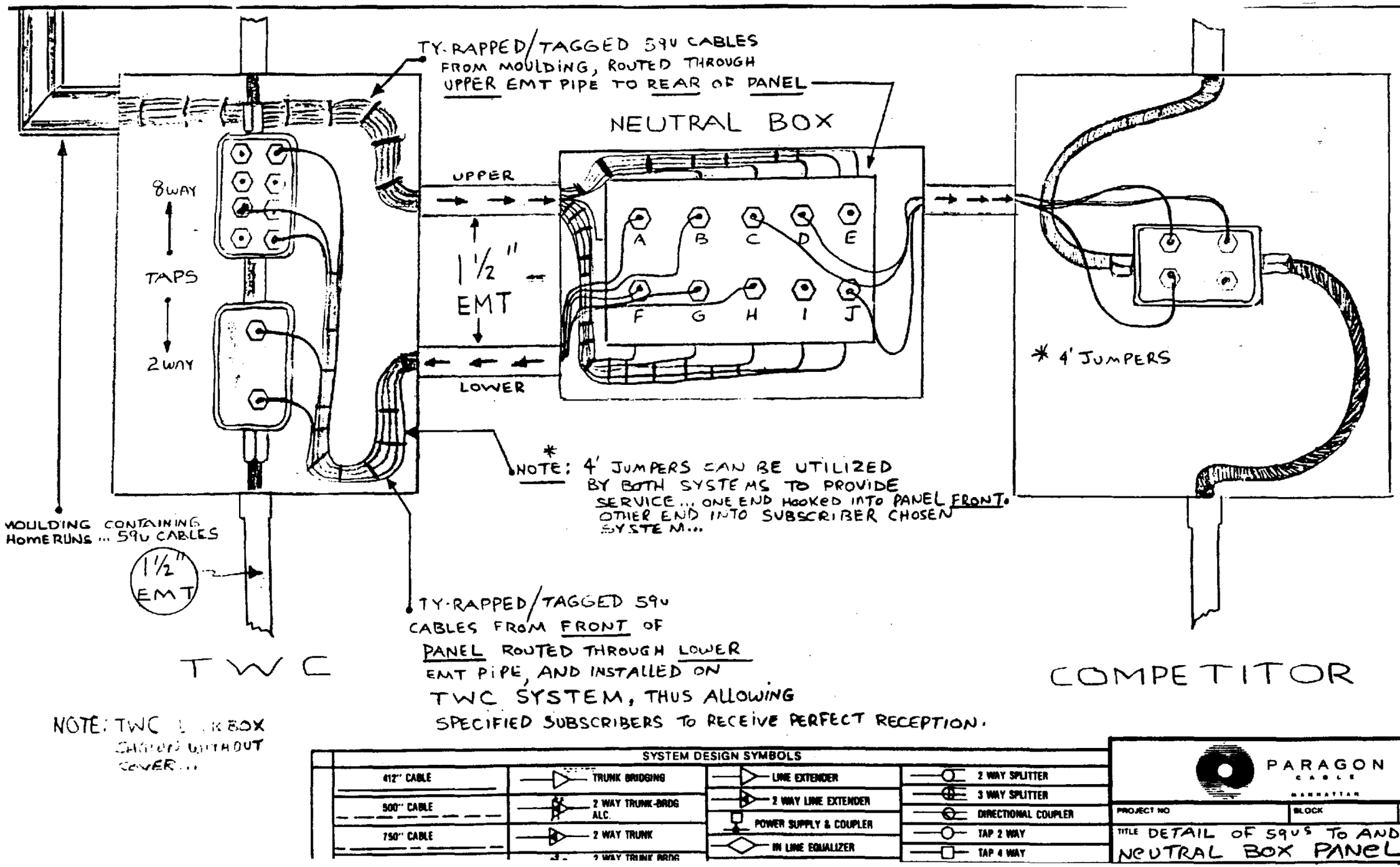
G. The Commission needs to consider whether one provider will be able to block the ability of the other provider to upgrade facilities in an MDU.

H. The Commission needs to address how its rules interplay with State property and contact law which provide for different demarcations, ownership, or termination rights.

I. The Commission needs to address how its rules interplay with State access to premises laws, under which many such facilities have been installed.

J. The Commission needs to address the tax and accounting issues surrounding the transfer of ownership of millions of dollars of distribution infrastructure constructed by the cable industry.

K. The Commission needs to establish a formula to provide just compensation for the facilities taken from the cable operator in connection with any change in the MDU point of demarcation.



* NOTE: 4' JUMPERS CAN BE UTILIZED BY BOTH SYSTEMS TO PROVIDE SERVICE ... ONE END HOOKED INTO PANEL FRONT. OTHER END INTO SUBSCRIBER CHOSEN SYSTEM ...

NOTE: TWC [illegible] BOX SHOWN WITHOUT COVER ...

SYSTEM DESIGN SYMBOLS

.412" CABLE	TRUNK BRIDGING	LINE EXTENDER	2 WAY SPLITTER
.500" CABLE	2 WAY TRUNK-BRDG ALC.	2 WAY LINE EXTENDER	3 WAY SPLITTER
.750" CABLE	2 WAY TRUNK	POWER SUPPLY & COUPLER	DIRECTIONAL COUPLER
	3 WAY TRUNK BRDG	IN LINE EQUALIZER	TAP 2 WAY
			TAP 4 WAY

PARAGON CABLE MANHATTAN

PROJECT NO	BLOCK	LOT

TITLE DETAIL OF 59US TO AND FROM NEUTRAL BOX PANEL

A CHANGE IN THE POINT OF DEMARCATION IN MDUs WOULD REQUIRE JUST COMPENSATION FOR THE TAKING OF A CABLE OPERATOR'S PROPERTY

A. A federal regulation which prevents a cable operator from enforcing its ownership rights to personal property is a taking, triggering the just compensation clause of the Fifth Amendment. See, e.g., Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 653 (Brennan, J. dissenting) (citing United States v. Dickinson, 331 U.S. 745, 748 (1947)).

1. The right to exclude others from using a cable operator's MDU wiring is a paramount property right, that if taken away by government action, constitutes a *per se* taking of property. See, e.g., Nixon v. United States, 978 F.2d 1269, 1285-86 (D.C. Cir. 1992); Kaiser Aetna v. U.S., 444 U.S. 164, 176 (1979); Hodel v. Irving, 481 U.S. 704, 716 (1987).

2. As the FCC is proposing to not only deny cable operators the right to exclude others from access to their wiring, but also their own right to access their wiring, it is undeniable that the FCC is proposing a *per se* taking of property without compensation. Nixon v. United States, 978 F.2d 1269, 1285-86 (D.C. Cir. 1992) ("The test must be whether the access rights preserve for the former owner the essential economic use of the surrendered property. That is, has the former owner been deprived of a definable unit of economic interests? If so, then it is no answer that he may still stand in some relation to the property.")

B. The FCC must have express statutory authority to affect a taking of personal property. See Bell Atlantic Telephone Cos. v. FCC, 24 F.3d 1441 (D.C. Cir. 1994). No such authority exists in the Communications Act as it relates to broadband inside wiring.

C. If the FCC proposes to offer compensation for the taking, there must be a case-by-case determination of the fair market value of the property.

1. A *per se* formula for just compensation (e.g., 6¢ per foot) will not pass constitutional muster. A party whose property is taken is entitled to a adjudicatory determination of just compensation, e.g., before an administrative or judicial tribunal. Florida Power Corp. v. FCC, 772 F.2d 1537, 1546 (11th Cir. 1985), rev'd on other grounds, 480 U.S. 245 (1987).

2. In determining just compensation on a case-by-case basis, the owner of "taken" property "is entitled to be placed in as good a position pecuniarily as if his property had not been taken." Olson v. United States, 292 U.S. 246, 255 (1934).

3. Just compensation means the fair market value of the property when appropriated. Kirby Forest Industries, Inc. v. United States, 467 U.S. 1, 10 (1984).

   a. Fair market value must include the business value of the cable operator's MDU distribution system. Providing an operator only the replacement cost or depreciated book value of the wiring would not compensate it for the economic value of its distribution system and would not satisfy just compensation any more than the price of bricks would compensate for the condemnation of an apartment building. United States v. Reynolds, 397 U.S. 14, 16 (1970) ("Compensable value is properly measurable in terms of [the taken property's] economic potential . . ."); Galveston Elec. Co. v. Galveston, 258 U.S. 388, 396 (1921) ("In determining the value of a business as between buyer and seller, the goodwill and earning power due to effective organization are often more important elements than tangible property."); Kimball Laundry Co. v. United States, 338 U.S. 1, 11 (1949) (Just compensation must include the value of trade routes disrupted by temporary government taking of physical plant).

   b. In determining fair market value, the owner is entitled to have the property valued at the "highest and best use," i.e., "the highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future . . . to the full extent that the prospect of demand for such use affects the market value while the property is privately held." Olson v. United States, 292 U.S. 246, 255 (1934); United States v. Land, 62.50 Acres, 953 F.2d 886 (5th Cir. 1992).

   c. While future profits are generally not included in determining just compensation, the fair market value includes not only the value of the property itself, but also "an assessment of the property's capacity to produce future income if a reasonable buyer would consider that capacity in negotiating a fair price for the property." Yancy v. United States, 915 F.2d 1534, 1542 (Fed. Cir. 1990).

   d. In this context, just compensation would be what a willing buyer would pay a willing seller for broadband video distribution facilities in an MDU, operating as a going concern.